JURISDICTION


1837
ARTES
VERITAS
SCIENTIA
LIBRARY OF THE
UNIVERSITY OF MICHIGAN
SI QUAERIS PENINSULAM AMOENAM
CIRCUMSPICE

JURISDICTION;

ITS EXERCISE IN

COMMENCING AN ACTION AT LAW.

BY

JOSEPH H. VANCE.

ANN ARBOR, MICH.:
THE ARGUS BOOK AND JOB ROOMS.
1890.

CONTENTS.

TABLE OF CASES CITED.

D.

G.

R.

T.

PREFATORY.

After having decided to bring an action at law for the purpose of obtaining a personal judgment against a person, the first question to be determined is: In which court should the action be brought? Or, as the question is usually asked: "What court has jurisdiction of the case?" After having determined which court has jurisdiction of the case, next follow these two inquiries: *first*, how is the jurisdiction of the court brought into action? *second*, by what principles is that action governed? To answer each of those inquiries is the object of this work.

J. H. V.

ANN ARBOR, MICHIGAN.

JURISDICTION.

1. *Source of Jurisdiction.* The State is an organism possessing political sovereignty which is the supreme, absolute, uncontrollable power by which the State is governed. The sovereign power of the State extends to all the subjects of government within its territorial limits;* that secures the protection of every legal right and the punishment of every public offense.

* This definition is applicable only to a State which possesses the powers of sovereignty relating to *all* the subjects of government. In American constitutional law the powers of sovereignty are classified, and some of them apportioned to the government of the United States for its exercise, while others are left to the States. Under this apportionment the former possesses supreme, absolute and uncontrollable power in respect to certain subjects throughout all the States, while the States have the like unqualified power, within their respective limits, in respect to the other subjects. (License Cases, 5 How. 506; U. S. v. Cruikshank, 92 U. S. 542.) Over certain other subjects the States have a qualified dependent or defeasible power, inasmuch as this action is liable at any time to be overruled, and their power to become dormant by the exercise of a superior power which is conferred upon the United States over the same subjects. (Cooley v. Port Wardens, etc,, 12 How. 299; Cooley's Principles of Constitutional Law.)

The agency by which this power is administered is that of courts;* they are created by the State; the State determines the territorial limits of each, and also prescribes the various subjects over which each shall have jurisdiction.

Cooper v. Reynolds, 10 Wall. 308.

2. *Jurisdiction Defined.* Jurisdiction is a power constitutionally conferred upon a court, a single judge or magistrate, to take cognizance of and decide causes according to law, and to carry their sentence into execution.

3 Bouv. Inst. 72.
Cooley's Const. Lim. 493 (5th ed.).
Rhode Island v. Massachusetts,12 Pet. 657, 717.
U. S. v. Arredondo, 6 Pet. 691.
City of Brownsville v. Basse & Hord, 43 Tex. 440.
Hopkins v. Commonwealth, 3 Met. 460.
Matter of Ferguson, 9 John. 239.
Sheldon's Lessee v. Newton, 3 Ohio St. 499.
Bush v. Hansom, 70 Ill. 480.
Vaughn v. Congdon, 56 Vt. 111.
Perry v. Morse, 57 Vt. 509.
Mills v. Commonwealth, 13 Pa. St. 627.
Robertson vs. State *ex rel.* Smith, 109 Ind. 79, 81.
Adams v. Cowles, 95 Mo. 503.

---

* A court is an organized body, possessing defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by its proper officers, namely, attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure due order in its proceedings. (Burrill's Law Dict.; Hobart v. Hobart, 45 Iowa, 501.)

Jurisdiction is original when it is conferred on a court in the first instance. Concurrent jurisdiction is that which is possessed over the same cause at the same time by two or more separate courts; and the general rule is, in all cases of concurrent jurisdiction, that the court which first obtains jurisdiction of a case must proceed and finally dispose of it.* This rule is followed in cases in which State courts and the courts of the United States possess concurrent jurisdiction.

Wallace v. McConnell, 13 Pet. 173.
Tylor v. Taintor, 16 Wall. 370.
Insurance Co. v. University, 10 Biss. 191.
S. C., 6 Fed. Rep. 443.
Bank v. R. R Co., 28 Vt. 470.
Stearns vs. Stearns, 16 Mass. 167.
Insurance Co. v. Howell, 24 N. J. Eq. 238.
Brooks v. Delaplaine, 1 Md. Ch. 351.
Wharf, etc., Co. v. Simpson, 77 Cal. 286.
Sharon v. Terry, 36 Fed. Rep. 337.
Riggs v. Johnson County, 6 Wall. 196.
Peck v. Jenness, 7 How. 612.
Peale v. Phipps, 14 How. 368.

---

* In Payne v. Drew, 4 East. 523, Lord Ellenborough said: "It appears to me, therefore, not to be contradictory to any cases or principles of law, and to be mainly conducive to public convenience and to the prevention of fraud and vexatious delay in these matters, to hold that where there are several authorities equally competent to bind the goods of a party, when executed by the proper officer, that they shall be considered as effectually and for all purposes bound by the authority which first attaches upon them in point of execution, and under which an execution shall have been first executed."

Hagan v. Lucas, 10 Pet, 400.
Pulliam v. Osborne, 17 How. 471.
Taylor v. Carryl, 20 How. 538.
People's Bank v. Calhoun, 102 U. S. 256.
Barton v. Barbor, 104 U. S. 126.
Covell v. Heyman, 111 U. S. 176.
Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294.*
Cooley v. Lawrence, 5 Duer, 605, 608.
Wilson v. Baker, 64 Cal. 475.
Logan v. Lucas, 59 Ill. 237.
Seibel v. Simeon, 62 Mo. 255.
Powers v. City Councils, etc., 116 Mass. 84.
Withers v. Denmead, 22 Md. 135.
Thompson v. Hill, 3 Yerg. (Tenn.) 167.

---

* In Covell v. Heyman, 111 U. S. 176, Mr. Justice Matthews delivered the opinion of the Court, from which the following quotation is taken: "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between the State courts and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one of them takes into its jurisdiction a specific thing that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

"The jurisdiction of a court," said Chief Justice Marshall,

A court which takes cognizance of an action at law and proceeds in it, decides in effect that it has jurisdiction, although such decision may not be announced in express terms.

Clary v. Hoagland, 6 Cal. 685.

And when a cause is presented to a court it must necessarily obtain jurisdiction so far as to decide the question of jurisdiction.

King v. Poole, 36 Barb. 242.

When a court has no jurisdiction of a cause submitted to it, the only action the court can take is to dismiss the cause. To do otherwise is an unwarranted assumption of power.

Robertson v. The State, *ex rel.* Smith, 109 Ind. 83.
Goff v. Robinson, 6 Vt. 643.

This is the rule when the question of jurisdiction is raised in a court of original jurisdiction. A different rule, however, necessarily prevails in an appellate court in cases where the subordinate court was without jurisdic-

---

"is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised." (Wayman v. Southard, 10 Wheat. 1.)

"The sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye." (Chief Justice Taney in Ableman v. Booth, 21 How. 506, 516.)

tion and has given judgment or decree for the plaintiff, or improperly decreed affirmative relief to a claimant. In such a case the judgment or decree in the court below must be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter in controversy.

U. S. v. Huckabee, 16 Wall. 414.

3. *Judicial Power.* The three well known divisions of the powers of the State are, *first*, legislative; *second*, executive; *third*, judicial. Their respective functions are distinct, and the agents for the performance of these functions are also distinct. "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law." *

Wayman v. Southard, 10 Wheat. 46.
Greenough v. Greenough, 11 Pa. St. 494.

And as all derive their authority from the same source, there is an implied exclusion of each department from exercising the functions conferred upon the others.

Cooley's Const. Lim., 106, 4th ed.

---

*That which distinguishes a judicial from a legislative act is, that the former is a determination of what the existing law is in relation to some existing thing already done or happened, while the latter is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions.

Courts, through the exercise of judicial power, apply the law to the rights of persons or property, in specific controversies between parties, determining their rights.

Cincinnati, etc., Railroad Co. v. Commissioners of Clinton Co., 1 Ohio St. 77.
Merrill v. Sherburne, 1 N. H. 204.
King v. Dedham Bank, 15 Mass. 454.
Taylor v. Place, 4 R. I. 324.
People v. Supervisors of New York, 16 N. Y. 432.
Beebe v. State, 6 Ind. 515.
Scheibler v. Mundiger, 86 Tenn. 674, 693.

And does so upon the application of one of the parties interested. And a judgment or a decree of a court made in the exercise of judicial power cannot be reviewed or reversed by legislative or executive authority. If reversed at all, that must be done by a higher court.

The phrase "*judicial power*" includes all the various ways in which the power may be exercised by a court when acting within the limits of its jurisdiction, whether

---

(Bates v. Kimball, 2 Chip. 71.) In another case it is said: "The legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the Federal and State constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative." (Newland v. Marsh, 19 Ill. 382.) On the other hand, to adjudicate upon, and protect, the rights and interests of individual citizens is the peculiar province of the judicial department. (Cincinnati, etc., Railroad Co. v. Commissioners of Clinton County, 1 Ohio St. 81; Cooley's Const. Lim. 110.)

in civil or criminal cases, and whether in the form of original or appellate jurisdiction. The phrase also embraces all the incidental powers for conducting trials, and the issuing of writs and orders, which are necessary to make the power practically effective.

4. *Courts are distinguished: first*, as courts of general jurisdiction; *second*, as courts of special, limited jurisdiction. A court of general jurisdiction is one whose authority extends to a great variety of matters. A court of general jurisdiction is presumed to be acting within its jurisdiction till the contrary is shown. It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority, and its jurisdiction is to be presumed whether there are recitals in its records to show it or not.

Courts of limited, special jurisdiction are confined strictly to the powers conferred upon them, and the record must contain every fact necessary to confer jurisdiction.

Granite Bank v. Treat, 18 Me. 340.
Wight v. Warner, 2 Doug. (Mich.) 384.
Shadbolt v. Bronson, 1 Mich. 85.
Spear v. Carter, 1 Mich. 19.
Barrett v. Crane, 16 Vt. 246.
Straughan v. Inge, 5 Ind. 157.
White v. Conover, 5 Blackf. 462.
Cobb v. State, 27 Ind. 133.
Mossman v. Forrest, 27 Ind. 233.
State v. Gachenheimer, 30 Ind. 63.
The Ohio, etc., R. R. Co. v. Shultz, 31 Ind. 150.
Perkins v. Attway, 14 Ga. 27.

N. J. R. R. Co., etc., v. Suydam, 17 N. J. L. 25.
Kane v. Desmond, 63 Cal. 464.
Keybers v. McComber, 67 Cal. 395.
Hanna v. Morrow, 43 Ark. 107.
Victor Mill Mining Co. v. The Justice Court, etc., 18 Nevada, 21.
Tompert v. Lithgow, 1 Bush. (Ky.) 176.
Hartford Fire Ins. Co. v. Owen, 30 Mich. 441.
Cardwell v. Sabichi, 59 Cal. 490.
In the Matter, etc., of David Hawley, 104 N. Y. 250.
People *ex rel.* Frey v. The Wardens, etc., *et al.*, 100 N. Y. 20.
State v. Metzger, 26 Mo. 65.
Gilbert v. York, 111 N. Y. 544.
Penrose v. McKinzie, 116 Ind. 35.

5. *When a Court of General Jurisdiction is considered as a Court of Limited Jurisdiction.* When the proceedings of a court of general jurisdiction do not come within the general or ordinary jurisdiction of the court, but the jurisdiction as to such proceedings is special and limited, dependent wholly upon statute, a court of general jurisdiction is considered as a court of limited jurisdiction; no presumption of jurisdiction is allowed. Therefore all the facts necessary to confer jurisdiction must appear affirmatively upon the record.*

Foot v. Stevens, 17 Wend. 487.
Gallatian v. Cunningham, 8 Cow. 361.

---

* In California presumptions apply in favor of courts of general jurisdiction whether they proceed under their powers as courts of general jurisdiction or under powers conferred by statute. (Hahn v. Kelly, 34 Cal. 393.)

Shivers v. Wilson, 5 Harris & John. 130.
Platt v. Stewart, 10 Mich. 260.
Merrill v. Montgomery, 25 Mich. 73.
Hartford Fire Ins. Co. v. Owen, 30 Mich. 441.
Earthman v. Jones, 2 Yerger, 484, 492.
Holly v. Bass's Admr., 73 Ala. 387.
Chesterfield County v. Hall's Ex'or, 80 Va. 321.
In the Matter of Mount Morris Square, 2 Hill. 14, 19.
People v. Blanchard, 61 Mich. 478.
Williamson v. Berry, 8 How. (U. S.) 495.
Foust v. Commonwealth, 33 Pa. St. 338, 343.
Gunn v. Howell, 27 Ala. 663.
Moore v. Presby, 5 Fost. (N. H.) 299.
Carleton v. Washington Ins. Co., 35 N. H. 162.
Sannoner v. Jacobson, 47 Ark. 31.
Randle v. Mellen, 67 Md. 181.
Ladbroke v. James, Willes, 199.
Sollers v. Lawrence, Willes, 413.
Mills v. Martin, 19 John. 7, 33.
Taylor v. Bruscup, 27 Md. 219.
People v. Wilkinson, 13 Ill. 660.
McCoy v. Zane, 65 Mo. 11.
Ells v. Pacific R. R. Co., 51 Mo. 200.
Kansas, etc., v. Campbell, 62 Mo. 585.
Woods v. Boots, 60 Mo. 546.
State v. Woodson, 41 Mo. 227.
Herrington v. Williams, 31 Tex. 448.
Clark v. Thompson, 47 Ill. 25.
Schnell v. City of Chicago, 38 Ill. 383.
Morris v. Hogle, 37 Ill. 150.
Cariker v. Anderson, 27 Ill. 358.
Rowley v. Berrian, 12 Ill. 198.
Vairan v. Edmonson, 5 Gilman, 270.
Lawrence v. Yeatman, 2 Scam. 15.
Haywood v. McCrory, 33 Ill. 459.
Haywood v. Collins, 60 Ill. 328.
Borders v. Murphy, 78 Ill. 81.

Clymore v. Williams, 77 Ill. 618.
Schloss v. Joslyn, 61 Mich. 269.
Hobson v. Emporium, etc., Co., 42 Ill. 308.
Martin v. Dryden, 6 Ill. 187.
Johnson v. Johnson, 26 Ind. 441.
Henrie v. Sweazy, 5 Blackf. 273.
Millar v. Babcock, 29 Mich. 526.
Woodruff v. Ives, 34 Mich. 320.
McKinney v. Collins, 88 N. Y. 216.
Clark v. Adams, 33 Mich. 159.
Davis Sewing Machine Co. v. Whitney, 61 Mich. 518.
King v. Harrington, 14 Mich. 532.
Buckley v. Lowry, 2 Mich. 418.
Roelofson v. Hatch, 3 Mich. 277.
Van Norman v. Jackson Circuit Judge, 45 Mich. 204.
Marx v. Abramson, 53 Tex. 264.
Bruhn v. Jefferson Bank, 54 Tex. 152.
Drew v. Claypool, 61 Mich. 233.
Steere v. Vanderberg, 67 Mich. 530.
Dillard v. Central Virginia Iron Co., 82 Va. 734, 742.
Anderson v. Coburn, 27 Wis. 558.
Judah v. Stephenson, 10 Ia. 493.
Cooper v. Smith, 25 Ia. 269.
Morris v. Union Pacific R. R. Co., 56 Ia. 135.
Charnock v. Colfax, 51 Ia. 70.
Hakes v. Shupe, 27 Ia. 465.
Repine v. McPherson, 2 Kan. 340.
Manley v. Headly, 10 Kan. 88.
Faulk v. Smith, 84 N. C. 501.
Claussen v. Pultz, 13 S. C. 475.
Bradley v. Jamison, 46 Iowa, 68.
Merced Bank v. Morton, 58 Cal. 360.
Dow v. Whitman, 36 Ala. 604.
Wright v. Smith, 66 Ala. 545.
Flexner & Lichten v. Dickerson, 65 Ala. 129.
Russell v. Gregory, 62 Ala. 454.
Deupree v. Eisenach, 9 Ga. 598.

Stowers v. Carter, 28 Ga. 351.
Neal v. Gordon, 60 Ga. 112.
Krutina v. Culpepper, 75 Ga. 602.
Wheeler v. Cobb, 75 N. C. 21.
Dillon v. Heller, 39 Kan. 599.
McLaughlin v. Davis, 14 Kan. 168.
Hentig v. Redden, 38 Kan. 496.
City of St. Louis v. Gleason, 93 Mo. 33.
Skelton v. Sackett, 91 Mo. 377.
Daugherty v. Brown, 91 Mo. 26.
Milner v. Shipley, 94 Mo. 106.

The strictness with which the proceedings of a court of special, limited jurisdiction are scrutinized, or the proceedings of a court of general jurisdiction when exercising a special statutory jurisdiction, applies only in respect to the question of jurisdiction. When that is established the maxim — "all things are presumed to have been rightly and regularly done" — applies to their proceedings.

The Board of Commrs. of Clay Co. v. Markle, 46 Ind. 96.
State of Ohio v. Hinchman, 27 Pa. St. 479.
Fox v. Hayt, 12 Conn. 491.
Paul v. Hussey, 35 Me. 97.
Wilson v. Wilson, 18 Ala. 176.
Morrow v. Weed, 4 Iowa, 77.
Fowler v. Jenkins, 28 Pa. St. 176.
C. B. & Q. R. R. Co. v. Chamberlain, 84 Ill. 333.
Hannibal & St. Joseph R. R. Co. v. Morton, 27 Mo. 317.
Reeves, etc., v. Townsend, etc., 22 N. J. L. 396.

6. *The Elements of Jurisdiction.* Two elements are involved in the jurisdiction of all judicial tribunals. These are, *first*, jurisdiction of the subject matter of the action or proceeding; and, *second*, jurisdiction of the parties thereto.

7. *Jurisdiction of the Subject-matter* is given to a court solely by the law; from no other source can the right to hear and determine be acquired; even consent cannot confer the right. This is an established maxim in the law, the meaning of which is that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties. Therefore, when a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it, is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceedings as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal action. This right he may avail himself of at any stage of the proceedings; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregularity, but a total want of power to act at all.

Dicks v. Hatch, 10 Iowa, 380.
Gilliland v. Admrs. of Sellens, 2 Ohio St. 223.
Andrews v. Wheaton, 23 Conn. 112.
Dodd v. Cady, 1 Minn. 223.
Ginn v. Rogers, 9 Ill. 131.
Brady v. Richardson, 18 Ind. 1.
Green v, Collins, 6 Ind. 139.

Bostwick v. Perkins, 4 Ga. 47.
The Georgia, etc., v. Harris, 5 Ga. 527.
Coffin v. Tracy, 3 Caine's Rep. 129.
Blinn v. Campbell, 14 John. 432.
Dudley v. Mayhew, 3 N. Y. 9.
Montgomery v. Heilman, 96 Pa. St. 44.
Cerro Gordo County v. Wright County, 59 Iowa, 485.
Walker v. Ivey, 74 Ala. 475.
Fahs v. Darling, 82 Ill. 142.
Smith v. Meyers, 109 Ind. 1.
Thayer v. Montgomery, 26 Vt. 491.
Landers v. Staten Island R. R. Co., 53 N. Y. 450.
Davidsburgh v. Knickerbocker Life Ins. Co., 80 N. Y. 527.
Burckle v. Eckhart, 3 Comst. 132.
Robinson v. Oceanic Steam Navigation Co., 112 N. Y. 315.
Walters v. Steamboat Mollie Dozier, 4 Iowa, 192.
Walker v. Kynett, 32 Iowa, 524.
Spear v. Carter, 1 Mich. 19.
Shadbolt v. Bronson, 1 Mich. 85.
Wilson v. Davis, 1 Mich. 157.
Atty. Gen. v. Moliter, 26 Mich. 444.
Thompson v. Mich. Mutual Benefit Assoc., 52 Mich. 522.
Orcutt v. Hanson, 75 Iowa, 514.

And the court may, on its own motion, when its attention is called to the facts, refuse to proceed further, and dismiss the suit.

Groves v. Richmond, 53 Vt. 388.
Dumont v. Frey, 12 Fed. Rep. 570.
Bennett v. Nichols, 12 Mich. 22.

As courts are created solely by the law, and the judges thereof are alone competent to exercise the powers belonging to the courts, it necessarily follows that parties to a suit cannot, by consent, confer jurisdiction of their cause upon a private person.

Hoagland v. Creed, 81 Ill. 503.
Bishop v. Nelson, 83 Ill. 601.
Cobb v. The People, 84 Ill. 571.
Leaman v. Sherman, 117 Ill. 657.
Smith v. Frisbie, 7 Iowa, 486.
Haverly Invincible Mining Co. v. Howcutt, 6 Col. 574.
Cooley's Const. Lim., 399, 5th ed.
Allor v. Wayne County Auditors, 43 Mich. 76, 97.

8. *Jurisdiction of the Person.* Jurisdiction over the person is acquired by the personal service of process upon the defendant, or by his voluntary submission to the jurisdiction of the court. The acquisition of jurisdiction of the person of the defendant, in one or the other of the ways above mentioned, is the first step in proceedings *in personam*; without that jurisdiction the court cannot render a personal judgment against the defendant.*

9. *Points to be Determined before Commencing an Action at Law.* Counsel must carefully examine the facts of a case, and determine whether they have, at any time, made a case which would have maintained an action at law. If counsel decides that the facts have made a case which would sustain a suit at law, he must further decide whether the right of action exists at the present time. Hence the following inquiries:

* This is illustrated in a suit by attachment against an absent defendant. In such a suit the court has authority over the property of the defendant which may be within the territorial limits of the jurisdiction of the court. But the court cannot render a personal judgment against the defendant, for the reason that it has not acquired jurisdiction over his person.

(1) Whether the right of action has been relinquished or lost by any act or omission of the plaintiff, as by laches, release, lapse of time, or other act.

(2) Whether any act yet remains to be done by the plaintiff to make his right of action complete, such as making a demand, giving notice, offering to perform a condition precedent, or the like.

(3) Whether, since the cause of action arose, it has been discharged; as by performance of the contract, or a tender made of the amount of the debt.

(4) Whether anything has been done concurrently by the parties, the effect of which is to suspend or discharge the right of action; as whether the terms of the contract have been altered; as an extension of time agreed upon for payment or performance; or whether upon an account stated a negotiable security has been taken by the plaintiff; or whether the parties have submitted the matter to arbitration, and the like.

(5) Whether anything has occurred to discharge or affect the right of action, independently of any act of either party; as whether the contract has become impossible to perform.

(6) Whether, and how far, the remedy is suspended or otherwise affected by the existence of some legal disability in either of the parties; such as infancy, lunacy, or coverture.

(7) When the cause of action is founded upon a contract, whether, and how far, it has been affected by a discharge under a bankrupt or insolvent law.

(8) Whether the right of action is barred by the statute of limitations.

Under the last head it will be necessary to refer to the statute of limitations for a designation of the various periods within which the several classes of actions must be brought; to settle the time when the cause of action is to be deemed to have accrued, and how the time of limitation is to be computed; to determine whether the case under consideration, if otherwise affected by the statute, falls within any of the exceptions, as in case of the party being an infant, married woman, insane, imprisoned, or out of the State at the time the cause of action accrued, or otherwise exempted from the operation of the statute; and finally, whether any admission or acknowledgment has been made by the party sought to be charged, which has revived or restored the right of action against him.

The statute (How., § 8723,) of limitations provides that the following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards; that is:

(1) All actions of debt, founded upon any contract or liability not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of this, or some other of the United States;

(2) All actions upon judgments rendered in any court other than those above excepted;

(3) All actions for arrears of rent;

(4) All actions of assumpsit, or upon the case, founded upon any contract or liability, express or implied;

(5) All actions for waste;

(6) All actions of replevin and trover, and all other actions for taking, detaining or injuring goods or chattels; and

(7) All other actions on the case, except actions for slanderous words or for libels.

All actions for trespass upon lands, or for assault and battery, or false imprisonment, and all actions for slanderous words and libels, shall be commenced within two years next after the cause of action shall accrue, and not afterwards.

How. St., § 8714.

All actions against sheriffs for the misconduct or neglect of their deputies, must be commenced within three years next after the cause of action shall accrue, and not afterwards.

How. St., § 8715.

If any person entitled to bring any of the actions mentioned in the general statute of limitations of personal actions, shall at the time when the cause of action accrues be within the age of twenty-one years, insane, or imprisoned in the State prison, or absent from the United States and from the British Provinces of North America, such person may bring the action within the times in the said statute respectively limited therefor, after the disability is removed.

How. St., § 8718.

All personal actions on any contract, not limited by the provisions hereinbefore mentioned, or by some other law of the State, must be brought within ten years next after the accruing of the cause of action, and not afterwards.

How. St., § 8719.

And every action upon a judgment or decree of a court of record of the United States, or of this State, or of any other State of the United States, must be brought within ten years next after the entry of such judgment or decree, and not afterwards.

How. St., § 8736.

10. *Process.* The process of a court is a judicial writ issued by the court in the name of the sovereign power;* it is the means by which a court subjects a person to its jurisdiction. The object of process is to give a person notice that a suit has been commenced against him, and to afford him an opportunity to contest the claim of the plaintiff. Notice of the commencement of suit by service of process the defendant is entitled to as

---

* Process is of four kinds:

1. Original process; that is, the writ by which a suit is commenced.

2. Mesne process; that is, process which is issued after the commencement of suit and before judgment.

3. Jury process; the process by which jurors are compelled to attend court.

4. Final process, which is issued in execution of a judgment.

Original process only is treated of in the text.

an absolute right; and, unless the required notice is given, the court cannot acquire jurisdiction. *

Bloom v. Burdick, 1 Hill, 130.
Williams v. Van Valkenburg, 16 How. Pr. 146.
Buck v. Sherman, 1 Doug. (Mich.) 176, 180.
Vleet v. Westenhaver, 42 Mich. 593.

11. *The Summons.* One of the ways in which a personal action may be commenced in the State of Michigan is by a process known as a summons.† This writ is obtained by applying to the clerk of the court and paying the entry fee. The application may be oral or by præcipe. A præcipe is a written request that process may issue stating the names of the parties, the nature of the process desired, and the return day.

The form of the summons is as follows:

"In the Name of the People of the State of Michigan:

To the Sheriff of the County of ..... We command you to summon C. D., if he may be found in your county, to be and appear before our Circuit Court for the said County of [L. S.] ....., at the court house in the (city) of ....., in said county, on the ..... day of ..... next, then and there to answer unto ..... plaintiff in a plea of trespass to

---

* The rule as given in the text is that by which the court acquires the right to render a personal judgment against a defendant.

† In the State of Michigan suit may be commenced by capias ad respondendum, summons, declaration, writ of replevin, writ of attachment, and writ of garnishment. Commencement of suit by summons is selected as an example of the means by which a court may acquire jurisdiction.

his damage ..... dollars, which shall then and there be made to appear; and have you then and there this writ.

Witness the Hon. ....., Circuit Judge of the ..... Judicial Circuit, at ....., this ..... day of ..... , in the year of our Lord, 188...

JOHN J. ROBISON, Clerk.

JAMES SMITH, Plaintiff's Attorney.

An analysis of the writ shows:

(1) That it is issued in the name of the Sovereign Power of the State,—that is, in the name of the "People of the State of Michigan";

(2) The writ is directed to the sheriff of the county;

(3) Commanding him to summon a certain person therein named to appear in court;

(4) To answer the claim made by a person named as plaintiff;

(5) And to return the writ to the court;

(6) The writ is tested in the name of the judge of the circuit court, bears the seal of the court, is signed by the clerk of the court, and bears the name of the plaintiff's attorney.

A summons when issued as original process, and as a commencement of a suit in behalf of a non-resident, must be endorsed, before service, by a suitable person as security for costs.*

How. St., § 7296.

---

*A summons, when plaintiff is not an inhabitant of this State, will not be set aside because security for costs is not filed as required by statute, provided the plaintiff gives such security *nunc pro tunc* before motion to set aside is granted. (Parks v. Goodwin, 1 Doug. (Mich.) 56.)

When a statute expressly directs that process shall be in a specified form, and issued in a particular manner, such provision is mandatory, and a failure to comply with the statute in that respect will render that process void.

Smith v. Aurich, 6 Col. 388.
Sidwell v. Schumacher, 99 Ill. 426.
Hochlander v. Hochlander, 73 Ill. 618.
Lyman v. Milton, 44 Cal. 630.

The ground on which statutory provisions are held to be mandatory, is that the legislature having declared what the process shall contain, and of what it shall consist, all other forms are, by implication, prohibited.*

12. *At what time Suit is Considered as Commenced.* The time when a suit is deemed as commenced is the time when the writ of summons is issued from the office of the clerk of the court, *for the purpose of service upon the defendant.* †

* There are decisions which conflict with the rule as given in the text; the weight of authority, however, sustains the rule as given above; and upon principle, also, that is the correct rule. (Sidwell v. Schumacher, 99 Ill. 426, 433.)

† There is no statute which declares at what time a suit begun by a writ of summons shall be considered as commenced, and the question has not been directly passed upon by the Supreme Court. In the case of Ralston *et al.* v. Henry Chapin and George Reppart, 49 Mich. 274, an action was begun by declaration, which was served on Chapin, who regularly appeared. Before the case came on for trial the other defendant, Reppart, appeared and pleaded, having never been served with process. In the circuit court the plaintiffs moved to set aside the plea as unauthorized, and the motion was granted and the plea set aside. As to that ruling the

13. *To whom Process should be Issued.* By the rules of the common law all writs and process were regularly delivered to the sheriff for service, and he was sworn to execute the same without favor, dread or corruption. If the sheriff was partial, by reason of consanguinity or affinity, or, if he was under the power of either party, or, if he was himself a party to the action, so that he could not be presumed indifferent in the service and return of the writ, the process was directed to the coroner. If the coroner was partial or not indifferent in the matter, two persons called elisors, against whom no cause of challenge existed, were named by the court to execute the process.

8 Bacon's Abr., 689, 690.

In the construction of statutes, courts will insure, if possible, to litigants the same rights that were secured by the rules of the common law, namely, that all process shall be served by disinterested and impartial officers or persons.

In this State a summons should be issued for service to the sheriff of the county in which the defendant resides,

---

Supreme Court say: "We think the defendant had a right to appear and plead as he did before the trial." .... "There is no doubt of the right of any defendant at common law or in equity against whom process has issued to appear without service." The decision in this case indirectly sustains the rule given in the text, for an appearance can not be made unless a suit has been commenced, and in this case, as to the defendant Reppart the process had not been served upon him; but he had the right to appear, for process had been *issued* against him.

or last resided; that must be done in good faith, and with intent that the writ shall be served. Process may be served by the sheriff's deputy when the law authorizes the appointment of a deputy. To constitute a valid service of a writ, service thereof must be made by a person authorized to make it.* A person other than an officer cannot serve process unless authorized by statute to do so.

Rasch v. Moore, 57 Mich. 54.
Murdock v. Phillips, 65 Wis. 622.†

An officer to whom process is given to serve, must exercise reasonable diligence, and make all reasonable efforts to execute the writ.‡

Hallett v. Lee, 2 Ala. 28.
Trigg v. McDonald, 2 Humph. 386.
Barnes v. Thompson, 2 Swan, 313.

---

* Hence service on the wrong person by mistake, followed by his delivering the writ to the defendant, is not a valid service. (Williams v. Van Valkenburg, 16 How. Prac. 146.)

† An infant can not be specially authorized to serve a writ by a justice who issues it, (Vail v. Rowell, 53 Vt. 109; Harvey v. Hall, 22 Vt. 211; Cuckson v. Winter, 2 Man. & Ry. 313; S. C., 17 Eng. Com. L. 306;) in the absence of authority conferred by statute. (Maynard v. McCrellish, 57 Cal. 355; Howard v. Galloway, 60 Cal. 10; Weil v. Bent, 60 Cal. 603.

‡ It is the officer's duty to adopt the proper measures by which he may find the defendant. If it is necessary for the officer to ascertain the residence of the defendant, he must not depend upon information he may obtain from those who may or may not know of it, as accident may or may not have brought it under their notice. He is bound to inquire of those who would probably be acquainted with the defendant's place of residence. (Dean and Chapter of Hereford v. Macknamara, 5 Dowl. and Ry.

What constitutes reasonable diligence in the service of a writ, in a given case, is a question of fact for the jury; and in deciding the question the jury must consider all the facts of a case.

Diligence in making service of a writ upon a defendant who cannot be found, requires the officer to make effort to serve the writ so long as service can be lawfully made under it.

Soule v. Hough, 45 Mich. 418.

An officer to whom process has been given for service is liable to the plaintiff for refusal or neglect to serve it, or for want of diligence in service.

How v. White, 49 Cal. 658.
State v. Lawrence, 64 N. C. 483.
State v. Porter, 1 Harr. 126.
Hinnman v. Borden, 10 Wend. 367.
Bank of Rome v. Curtiss, 1 Hill, 275.
Hoagland v. Todd, 37 N. J. L. 544.

Physical incapacity to serve process, such as sickness, will not excuse the lack of diligence in an officer. When, for such cause, the officer is unable to serve process, he should promptly place it in the charge of an officer authorized to serve process, or without delay notify the plaintiff or his counsel of his inability to act officially.

Freudenstein v. McNier, 81 Ill. 208.

14. *How Service must be Made.* When service of

95; Spencer v. Bank of Salina, 3 Hill, 520; Tomlinson v. Rowe, Lalor's Supplement to Hill & Denio, 410.)

process is required, personal service is intended unless provision for other service is made.

Marcele v. Saltzman, 66 How. Pr. 205.

Service of a writ of summons in this State is made by showing the original writ to the defendant, and delivering to him a copy thereof.

How St., § 7300.*

When a statute prescribes the manner in which process must be served upon a defendant, the statute must be obeyed.

Matteson v. Smith, 37 Wis. 333.
Sayles v. Davis, 20 Wis. 302.
Knox v. Miller, 18 Wis. 397.
McConkey v. McCraney, 71 Wis. 576.
McCall v. Byram Manf. Co., 6 Conn. 428.
Felkins v. O'Sullivan, 79 Ill. 524.
Robbins v. Clemmens, 41 Ohio St. 285.
Sheldon v. Comstock, 3 R. I. 84.
Peck v. Warren, 8 Pick. 163.
Arnold v. Tourtellot, 13 Pick. 172.

15. *Service of Process on Corporations.* As a corporation exists only as a legal concept, it is obviously impracticable to make service of a writ upon a corporation aggregate directly. For this reason, it is one of the implied conditions in the creation of every corporation aggregate, that its managing agents shall be invested with

* Service of process by merely laying it on the body of a man who is so sick that he cannot understand it, is invalid. (The People *ex rel.* Philip Midler v. The Judge of the Superior Court, 38 Mich. 310.)

authority to receive service of process directed against the corporation; therefore service upon the proper officer will constitute a valid service upon the corporation itself. In Newby v. Van Oppen, L. R., 7 Q. B. 293, Mr. Justice Blackburn said: "At common law the service of a writ on a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer so as to secure that it had come to the knowledge of the corporation, and then proceeding by distress. The clerk or officer must be in the nature of a head officer, whose knowledge would be that of the corporation."

Newell v. Great Western Railway, 19 Mich. 336.*
Chamberlain v. Mammoth Mining Co., 20 Mo. 96.
Glaize v. South Carolina R. R. Co., 1 Strobh, 70.
Gillig v. Independent, etc., Mining Co., 1 Nev. 206.
O'Brien v. Shaw's Flats, etc., Canal Co., 10 Cal. 343.
Willamette Falls Canal, etc., Co. v. Williams, 1 Oreg. 112.
McCall v. Byram Manf. Co., 6 Conn. 428.

---

* Since the decision rendered in the case of Newell v. Great Western Railway Co., 19 Mich. 345, the Legislature has provided for suits by and against foreign corporations in this State. (How. Stat., § 8145.) "Suits may be commenced at law or in equity in the circuit court for any county in this State where the plaintiff resides, or service of process may be had, and in cases where the plaintiff is a non-resident, in any county of the State, against any corporation *not* organized under the laws of this State, in all cases where the cause of action accrues within the State of Michigan, by service of a summons, declaration or chancery subpœna within the State of Michigan, upon any officer or agent of the corporation, or upon the conductor of any railroad train, or upon the master of any vessel belonging to and in the service of the cor-

16. *General Rule by Statute.* At the present time the method of serving process upon corporations is generally regulated by statute. It is usually provided that, if process directed against a corporation is served upon certain specified agents of the corporation, it shall be valid as a service upon the corporation itself.

17. *Rule in the Courts of the United States.* These courts follow the law of the State as to service of process upon domestic corporations. A foreign corporation may be sued within any jurisdiction wherein it carries on an important part of its business. Where, under the laws of the State, it is required as a condition of doing business within the State that it shall appoint an officer or agent upon whom process may be served, such corporation is always treated as "found" within the State within the meaning of the judiciary act; and suits may be instituted in the Federal courts by service of process upon him.

---

poration against which the cause of action accrued: *Provided*, That in all such cases no judgment shall be rendered for sixty days after the commencement of suit; and the plaintiff shall, within thirty days after the commencement of suit, send notice by mail to the corporation defendant at its home office." (Maxwell v. Speed, 60 Mich. 36.) In Shickle, etc., Iron Co. v. The S. L. Wiley Construction Co., etc., 61 Mich. 226, it is decided that to constitute a valid service of process under the statute it is not necessary that the officer or agent of a foreign corporation should be in this State on official business, or should be specially authorized to receive service of process.

Ex parte Schollenberger, 96 U. S. 369.
Brownell v. Troy, etc., Railroad Co., 3 Fed. Rep. 761.
Runkle v. Lamar Insurance Co., 2 Fed. Rep. 9.
Knott v. Southern, etc., Insurance Co., 2 Woods, 479.
Fonda v. British, etc., Assurance Co., 6 Cent. L. J. 305.

But when an officer of a foreign corporation is temporarily visiting or travelling within the State, service of process against the corporation cannot be made upon him if the corporation is not actually doing business within the State.

St. Clair v. Cox, 106 U. S. 350; S. C., 1 Sup. Ct. Rep. 534.

18. *Attempt to Avoid Service.* A person on whom an officer is directed to serve a writ of process cannot defeat service by refusing to receive a copy of the writ, or by running away from the officer, after the latter has made known his intention to serve the writ. If the party on whom the officer is directed to serve the writ refuses to accept a copy thereof, the proper practice is for the officer to give or offer the copy of the writ to the defendant, *within his reach*, or to lay the copy down *within the reach* of the defendant, or to put it in *a convenient place* in his presence.

Van Rensselaer v. Petrie, 2 How. Prac. 94.
Norton v. Meader, 4 Sawyer, 603.
The Farmers' Insurance Co. v. Highsmith, 44 Iowa, 330.

Refusal to hear process read does not defeat service in all other respects legally sufficient.

Slaght v. Robbins, 13 N. J. L. 340.

19. *Time within which Process must be Served.* Service of process must be made during its lifetime, which

commences with the day it issues and includes the return day of the writ. After the return day the writ is exhausted, and warrants no kind of proceeding.

1 Salk, 321; Ventris, 30; Yelverton, 157; Tidd's Prac. 1072.
Adams v. Freeman, 9 John. 117.
State v. Kennedy, 18 N. J. L. 26.
Davy v. Salter, 6 Mod. Rep. 251; note *e*, 252.
Vail v. Livingston, 4 John. 450.
Hitchcock v. Haight, 17 Ill. 604.
Crews v. Garland, 2 Munf. 491.
Matthews v. Warne, 11 N. J. L. 351.
Eaton v. Fullett, 11 Ill. 491.
Towner v. Phelps, 1 Root, 250.

20. *Where Service must be Made.* Service of process must be made within the territorial limits of the jurisdiction of the court; service beyond such boundary is void.

Lowe v. Alexander, 15 Cal. 297.
Schwinger v. Hickok, 53 N. Y. 280.
Harkness v. Hyde, 98 U. S. 476.
McEwan v. Zimmer, 38 Mich. 765.
Petty v. People, 118 Ill. 148.
Penoyer v. Neff, 95 U. S. 714.
Picquet v. Swan, 5 Mason, 35.
The State v. Simmons, 39 Kan. 262.
Cooper v. Reynolds, 10 Wall. 308.
Lovejoy v. Albee, 33 Me. 415.
O'Sullivan v. Overton, 56 Conn. 102.
Dunn v. Dunn, 4 Paige, 425.
Holmes v. Holmes, 4 Lans. 392.
Ableman v. Booth, 21 How. (U. S.) 506.
Lutz v. Kelly, 47 Iowa, 307.
Bischoff v. Wethered, 9 Wall. 812.
Shepard v. Wright, 113 N. Y. 582.
Freeman v. Alderson, 119 U. S. 185.

A statute which authorizes the service of process on a defendant "wherever found" does authorize the personal service of process beyond the territorial limits of the jurisdiction of the court.

Ralston's Appeal, 93 Pa. St. 133.
Burton v. Burton, 45 Hun. 68.
Dillard v. Central Virginia Iron Co., 82 Va. 734.

21. *Service of Process on Joint Debtors some of whom are Non-residents of the County.* Under How. St., Sec. 7316, providing in the case of joint debtors for service of process of the circuit courts out of the county where one is served within it, an absent defendant cannot lawfully be served with process until after service has been made and proved on some one of the joint defendants within the jurisdiction; this is a condition precedent to any service upon a defendant out of the county, and its performance can only be shown by a return of service upon the party within the county, or by his appearance.

Denison v. Smith, 33 Mich. 157.
Clark v. Lichtenberg, 33 Mich. 307.

22. *Officer Serving his own Process.* The law will not permit an officer to serve process in a case in which he is a party or is the complainant. "The law wisely foreseeing that the ministers of justice should be freed, as far as practicable, from all the improper bias which may result from self-interest, has declared that no man shall be his own officer, and that no one shall in his own person, and by his own hand, do himself right by legal process. Therefore, where an officer is interested, it de-

clares that another shall act; and this, in principle, applies to all, though to some with greater, others with less, force."

Heiner v. Wolfer (Ill.), 9 West. 536.
Morton v. Crane, 39 Mich. 526.
Singletarry v. Carter, 1 Bailey, 467.
Bush v. Meacham, 53 Mich. 574.

Nor can any reasonable distinction be taken as respects the nature of the process, or the degree of interest; the broad ground is the safest, that no officer who is interested in a suit, or who is even a party to it without interest, shall serve any process appertaining to it from the commencement to the conclusion.

Filkins v. O'Sullivan, 79 Ill. 524.
Woods v. Gilson, 17 Ill. 218.
Singletarry v. Carter, 1 Bailey, 467.
Knott v. Jarboe, 1 Met. (Ky.) 504.
Chambers v. Thomas, 3 A. K. Marsh, 536.
Boykins v. Edwards, 21 Ala. 261.

The reason given for this rule is, that as the law, upon very imperative reasons, makes official returns conclusive for very many purposes, a different rule would be equivalent, in numerous cases, to making the officer judge in his own cause, and placing the other party at his mercy. A service, therefore, by the officer in such a case is a nullity. Statutes forbidding service of process by an officer when a party are considered as affirming common law principles.

Knott v. Jarboe, 1 Met. (Ky.) 504.
Toenniges v. Drake, 7 Col. 471.
Chambers v. Thomas, 3 A. K. Marsh, 536.

When an officer cannot act, his deputy cannot, for the reason that the deputy can act only for him and in his name.

Gage v. Graffam, 11 Mass. 181.
May v. Walters, 2 McCord, 470.*

One deputy cannot serve process on another except by statutory authorization.

Brown v. Gordon, 1 Greenl. 165.
Douglass v. Gardner, 63 Me. 462.

If the sheriff is also a coroner, and the writ is directed

---

* There are decisions in New York which hold that where the first process in a suit is not process against the body, the plaintiff if a constable may serve it himself; the same cases, however, concede that he could not in his own suit serve a warrant or execution. (Bennett v. Fuller, 4 John. 486; Tuttle v. Hunt, 3 Cow. 436; Putnam v. Man, 3 Wend. 203.) The reason for holding that he may serve the one process but not the others, appears to be that in the case of a summons there is no special danger of abuse, while in the other cases there would. Experience, however, does not warrant this conclusion. The danger of abuse in case of a summons consists in this, that the officer may falsely make a return of a service never made, and thereby put himself in position to obtain judgment by default against a party who, perhaps, will hear of the proceedings for the first time when an execution appears against him. No danger of abuse of process from an officer serving his own process can be greater than this, and the practice which would subject the officer to this temptation should not be tolerated. The courts generally have adhered, with great propriety and justice, to the rule that in no case shall a man be officer and party in the same proceeding. The danger of allowing an officer to serve process when he is a party plaintiff to a suit, is seen in the case of Putnam v. Man, 3 Wend. 202, in which it was held that the constable's return of service of a summons in his own favor could not be put in issue.

to a coroner, the service is illegal if made by him as sheriff, when his deputy is a party to the action.

Graves v. Smart, 75 Me. 295.

23. *When to be Returned.* A summons issued by a circuit court in Michigan may be made returnable on the first Tuesday of any month, or any day in term; but it cannot be made returnable more than three months from its date, unless more than that time intervenes before the next term, in which case it must be returnable on or before the first day of the next term.

Circuit Court Rule 13.

24. *Return Defined.* A "return" of a writ of process consists of an endorsement upon it, or a certificate attached thereto of what the officer has done in obedience to the writ, and also a delivery of the writ after such endorsement or certification to the clerk of the court from which the writ issued. A writ is said to be "filed" in the office of the clerk of the court upon the performance of these acts. When "filed," a return is complete.

Cook v. Nelson, 19 Ill. 440.

The date of the return must be endorsed upon the writ by the clerk of the court.

Circuit Court Rule 75.

25. *Object of the Return.* When the return has been completed, it is thereby made a part of the record of the case, and from the return thus made part of the record, the court must determine whether it has or has

not acquired jurisdiction of the defendant. The defendant, also, has a right to depend upon what the return shows when made part of the record.

Denison v. Smith, 33 Mich. 157.

It is the duty of the officer to obey the command of the writ.

Graves v. Smart, 75 Me. 295.

He must, therefore, make return thereof, whether it has been served or not.

Brown v. Baker, 9 Port. (Ala.) 503.
Webster v. Quinby, 8 N. H. 382.
Clingman v. Barrett, 6 Humph. 20.
Bently v. Klrk, 1 Baxt., 385.
Bearshears v. Warner, 5 Sneed, 676.
Koger v. Donnell, 1 Head, 378.

A return should contain a statement of the acts which the officer has done under and by virtue of the writ, and the place and the time when and where they were done. The service of process is simply ministerial in character. Hence the officer is not permitted to make return by stating a legal conclusion, such as that he has "duly" or "legally" served the process committed to him. He should set forth what he did, and when and where, and leave the question of the legality of his acts to the court.*

Sheldon v. Comstock, 3 R. I. 84.
Watson v. Watson, 9 Conn. 140.

---

* The rule given in the text as to what facts should be contained in a return of service of process should be followed except when a statute modifies the rule.

Rankin v. Dulaney, 43 Miss. 197.
Stediford v. Ferris, 4 N. J. L. 120.

When a statute prescribes the manner of service of process, a return should show such acts of service as are a compliance with the statute.

Filkins v. O'Sullivan, 79 Ill. 524.
Faison v. Wolf, 63 Miss. 24.
Sheldon v. Comstock, 3 R. I. 84.

An officer who would justify his official action, which has been performed under the authority of returnable process, must do so by showing that he made return as directed by the writ. The command to serve and return the writ is not divisible, permitting him to return without service, or serve without making return. Unless the parties assume the control of the process, the duty of the officer is, in law, one single act, comprehending all the steps essential to a legal execution of the process, even to its final return. In such a case the return is indispensable.*

Bacon's Abr., tit. Trespass, 450.
Buller's Nisi Prius, 23.
Rowland v. Veale, 1 Cowper, 18.
Freeman v. Blewett, 1 Ld. Raymond, 632.
Middleton v. Price, 2 Strange, 1184.
Ellis v. Cleveland, 54 Vt. 437.
Munroe v. Morrill, 6 Gray, 238.
Williams v. Babbitt, 14 Gray, 141.

* A sheriff is liable for neglect or refusal to return process, (State v. Schar, 50 Mo. 393); for making a false return, (Duncan v. Webb, 7 Ga. 187); or for one made by his deputy, (Frosser v. Coots, 50 Mich. 262).

Russ v. Butterfield, 6 Cush. 242.
Shorland v. Govett, 5 Barn. & Cress, 485.
Wright v. Marvin, 59 Vt. 437.

26. *Return as Evidence.* Return of service of a writ by an officer is, when a return is required by law, the only proper evidence of what has been done by him in obedience to the writ, and an omission of a fact which the return should contain cannot be supplied by any other proof.

Fairfield v. Paine, 23 Me. 498.
Crane v. Higginbotham, 83 Ala. 429.

The return, however, is evidence only of such of his acts as he may lawfully do under and by virtue of the writ.

The Charles City Plow and Manufacturing Co. v. Jones & Co., 71 Iowa, 234.
Sheldon v. Comstock, 3 R. I. 84.
Arnold v. Tourtellot, 13 Pick. 172.

A return may be made on any reasonable business hour of the return day; and evidence of the usual hours during which the clerk's office is open is *prima facie* evidence of what is such reasonable time.

Bull v. Clark, 2 Met. 587.
Homan v. Liswell, 6 Cow. 659.
Rex v. Sheriff of Berks, 5 East. 386.

27. *Return may be Amended.* When anything is by mistake or inadvertence omitted from the return which is essential to give validity to a judgment, the omission may be supplied by amendment.

Toledo, etc., R. R. Co. v. Butler, 53 Ill. 323.

Until the return has been filed it is under the officer's control, although it may have been signed by him; he may, therefore, change the return so as to make it conform to the facts.

Spoor v. Holland, 8 Wend. 445.
Watson v. Toms, 42 Mich. 560.
Nelson v. Cook, 19 Ill. 440.
Webb v. Joy, 13 Pick. 477.

But after a return has been filed in the office of the clerk of the court, it then forms part of the record of the case, and cannot be amended without the authority of the court, and the court will give such authority upon a proper showing.

When the record itself contains the data for the required amendment, the court readily allows it to be made, because the danger of doing injustice in permitting it to be made is very slight.

Emery v. Whitwell, 6 Mich. 474.

But when the amendment is to be from an extrinsic showing, all practicable precautions should be taken that no one be wronged by allowing the amendment; and as most facts are susceptible of contradiction, there should always be, when practicable, notice to the party adversely interested, in order that he may have an opportunity to make a counter showing.

Montgomery v. Merrill, 36 Mich. 103.
Chichester v. Conde, 3 Cow. 39.
Hamilton v. Seitz, 25 Pa. St. 226.
Walker v. Hall, 15 Conn. 32.
Weed v. Weed, 25 Conn. 337.

Farmington v. Sumersworth, 44 N. H. 58.
Dan v. Fenn, 12 N. J. L. 321.
Hill v. Hoover, 5 Wis. 386.
Gillett v. Robins, 12 Wis. 319.
McLaughlin v. O'Rourke, 12 Iowa, 459.
Blaisdell v. Steamboat, 19 Mo. 157.
Webster v. Blount, 39 Mo. 500.
Jackson v. O. & M. R. R. Co., 15 Ind. 192.
Young v. Thompson, 24 Ill. 310.
Means v. Means, 42 Ill. 50.
Dorsey v. Pierce, 6 Miss. 173.
Alexander v. Stewart, 23 Ark. 18.
Freeman on Judgments, § 72.
Denison v. Smith, 33 Mich. 155.

28. *Abuse of Process.* Abuse of process consists in willfully using it for a purpose not justified by the law. Such abuse of process the courts will not permit. One way in which process is sometimes abused is by making use of it to accomplish, not the ostensible purpose for which it is taken out, but for some other purpose for which it is an illegitimate and unlawful means.* Courts

* At common law, parties and witnesses when attending in good faith any legal tribunal, were privileged from arrest on civil process during their attendance and for a reasonable time in going to and returning from court. (Thompson's Case, 122 Mass. 428.) To this privilege they were entitled whether they attended on summons or did so voluntarily, and whether they had or had not obtained a writ of protection. (Walpole v. Alexander, 3 Doug. 45; Meekins v. Smith, 1 Hen. Bl. 336; Arding v. Flower, 8 T. R. 534; Spence v. Stuart, 3 East. 89; *Ex parte* Byne, 1 Ves. & B. 316; Persse v. Persse, 5 H. L. Cas. 671; McNeit's Case, 6 Mass. 245; Wood v. Neale, 5 Gray, 538.)

In some of the early cases in this country the courts held that the privilege of suitors and witness extended no further than ex-

will not tolerate service of civil process on any person who, for that purpose, has been deceitfully brought within their jurisdiction.

Sutton v. Benin, 11 Mod. 50.
Dunlap v. Cody, 31 Iowa, 260; S. C., 7 Am. Rep. 129.
Townshend v. Smith, 47 Wis. 623; S. C., 32 Am. Rep. 783.
Steel v. Bates, 2 Aikens (Vt.) 338; S. C., 16 Am. Dec. 720.
Williams v. Reed, 29 N. J. L. 385.
Wanzer v. Bright, 52 Ill. 35.
Van Horn v. Great Western Manf. Co., 37 Kan. 523.
Hill v. Goodrich, 32 Conn. 588.
Baker v. Wales, 45 How. Pr. 137; S. C., 14 Abb. Pr., (N. S.) 331.
Metcalf v. Clark, 41 Barb. 45.
Stein v. Valkenhuysen, El. Bl. & El. 65.
Slade v. Joseph, 5 Daly, 187, 190.

These cases establish the general principle that a valid and lawful act can not be accomplished by any unlawful means, and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights.

Ch. J. Shaw, in Wingate v. Insley, 12 Pick. 270.

A court will also protect from service of civil process, while attending in good faith all proceedings in their nature judicial, whether taking place in court or not, dur-

---

emption from arrest, and that service by summons was legal, and where an arrest was made, common bail must be filed or a general appearance entered. (Blight v. Fisher, Pet. Cir. Ct. 41; Hunter v. Cleveland, 1 Brev. 167; Taft v. Hoppin, Anthon N. P. 255; Booraem v. Wheeler, 12 Vt. 331.)

ing their attendance, and for a reasonable time in going and returning, both parties and witnesses, who in obedience to its process, or *in furtherance of its proceedings*, appear within its jurisdiction.*

* People, etc., v. Judge, 40 Mich. 729. In this opinion, the court, by Judge Cooley, say: "There is no doubt whatever that the privilege exists in the case of all proceedings in their nature judicial, whether taking place in court or not. (Fletcher v. Baxter, 2 Aik. (Vt.) 224; Sanford v. Chase, 3 Cow. 381; Clark v. Grant, 2 Wend. 257.) And in Reinneer v. Green, 1 M. & S. 638, it was very justly recognized in the case of bail attending for the purpose of justification. In Commonwealth v. Hanes, 13 Bush. 699, where the privilege was allowed in the case of one brought within the jurisdiction on process of extradition, it is clearly shown that the reason of the privilege must determine its extent." To the same effect see Cannon's Case, 47 Mich. 482; Baldwin v. Judge, 48 Mich. 525.

In Mitchell v. Huron Circuit Judge, 53 Mich. 541, the facts were as follows: A resident of Bay County, who was a party to two suits pending in the County of Huron, went into the latter county to attend the trials thereof. He was examined as a witness in one of the cases, and the other was continued. While in attendance he was served with summons in the latter county in another case; he applied to the court on a submission of the facts to set aside the service; the application was refused, and he then applied to the Supreme Court for a writ of mandamus. The court, by Cooley, J., say: "We think the case is within the principle of Watson v. Judge of Superior Court, 40 Mich. 729, and that the writ should issue. Public policy, the due administration of justice, and protection to parties and witnesses, alike demand it. There would be no question about it if the suit had been commenced by arrest; but the reasons for exemption are applicable, though with somewhat less force, in other cases also. The following cases may be referred to for the general reasons: Norris v. Beach, 2 Johns. 294; Sanford v. Chase, 3 Cow. 381; Dixon v.

As to the privilege of parties, see:

Solomon v. Underhill, 1 Camp. 229.
Moore v. Booth, 3 Ves. Jr. 350.
Bromley v. Holland, 5 Ves. Jr. 2.
Ex parte King, 7 Ves. Jr. 312.
Sidgier v. Birch, 99 Ves. Jr. 69.
Ex parte Hawkins, 4 Ves. Jr. 691.
Persse v. Persse, 5 H. L. Cas. 671.
Gilpin v. Cohn, L. R. 4 Exch. 131.
Ex parte Britten, 4 Jur. 943.
Gregg v. Sumner, 21 Ill. App. Ct. 110.
McNab v. Bennett, 66 Ill. 157.
Juneau Bk. v. McSpedan, 5 Biss. 64.
Plimpton v. Winslow, 9 Fed. Rep. 365.
Matthews v. Tufts, 87 N. Y. 568.
Bridges v. Sheldon, 7 Fed. Rep. 17.
Wood v. Wood, 78 Ky. 624.
Sewing Machine Co. v. Wilson, 22 Fed. Rep. 803.
Small v. Montgomery, 23 Fed. Rep. 707.

As to the privilege of witnesses, see:

Willingham v. Matthews, 6 Taunt. 356.
Spence v. Stuart, 3 East. 89.

Ely, 4 Edw. Ch. 557; Clark v. Grant, 2 Wend. 257; Seaver v. Robinson, 3 Duer, 622; Person v. Grier, 66 N. Y. 124; Matthews v. Tufts, 87 N. Y. 568; Hall's Case, 1 Tyler, 274; *In re* Healey, 53 Vt. 694; Miles v. McCullough, 1 Binn. 77; Halsey v. Stewart, 4 N. J. L. 366; Dungan v. Miller, 37 N. J. L. 182; Vincent v. Watson, 1 Rich. Law, 194; Sadler v. Ray, 5 Rich. Law, 523; Martin v. Ramsey, 7 Humph. 260; Dickenson's Case, 3 Harr. (Del.) 517; Henegar v. Spangler, 29 Ga. 217; May v. Shumway, 16 Gray, 86; Thompson's Case, 122 Mass. 428; Ballenger v. Elliott, 72 N. C. 596; Parker v. Hotchkiss, Wall. Cir. Ct. 269; Juneau Bank v. McSpedan, 5 Biss. 64; Arding v. Flower, 8 Term, 534; Newton v. Askew, 6 Hare, 319; Persse v. Persse, 5 H. L. Cas. 67. See also Matter of Cannon, 47 Mich. 481.

Arding v. Flower, 8 Term, 534.
Montague v. Harrison, 3 Com. Bench. (N. S.) 298; S. C., 91 Eng. C. L. 292.
Person v. Grier, 66 N. Y. 124.
Brooks v. Farwell, 4 Fed. Rep. 166.
Nichols v. Horton, 14 Fed. Rep. 327.
Thompson's Case, 122 Mass. 428.
In re Healy, 53 Vt. 694.

This privilege of exemption from service of process arises out of the authority of the court where the suit is pending, and that court, on its own account, is interested in protecting the privilege; but if a court allows its process to be abused to the injury or oppression of any person, any other court of competent authority should interfere for his protection.

People v. Judge, 40 Mich. 929.*

---

* The facts in the case of People v. Judge were as follows: The relator was arrested in the County of Oakland on process issuing out of the Circuit Court of the United States for the eastern district of Michigan, in a civil suit brought by Marshall Field and others, and taken to the city of Detroit, in Wayne County, where he gave the usual appearance bail to the marshal and was discharged. He was thereupon immediately arrested again on civil process issuing out of the Superior Court of Detroit, at the suit of other plaintiffs, and gave appearance bail to the sheriff. Subsequently he was surrendered in exoneration of his bail to the sheriff, and then moved in the Superior Court for discharge from the arrest on the process of that court. The grounds of the motion were, *first*, that the affidavits for the arrest were insufficient, and, *second*, that the arrest was made in disregard of a privilege from arrest to which the relator was then entitled. The motion was overruled, and the case taken to the Supreme Court. The opinion of the court is by Cooley, J., from which the following

A writ of protection may be issued out of the court in which the cause is pending, but such a writ is not necessary, except for convenient and authentic notice to those about to do what would be a violation of the privilege. Such writ neither establishes nor enlarges the privilege, but merely sets forth and commands due respect to it.

1 Greenl. Ev., § 216.
Hall's Case, 1 Tyler, 274.

---

quotation is taken: "If the question were merely whether the process of the Superior Court had not been employed in contempt of its authority, or to the prejudice of proceedings therein, it might no doubt be safely left to that court to assert its proper dignity and redress any wrong which had been committed. (Commonwealth v. Hambright, 4 Serg. & R. 149.) But the privilege in this case arises, not under the process of the Superior Court, but under that of the Federal Court, and the latter, if either, is the court that on its own account would be interested in protecting the privilege. But we cannot agree that an appeal to the Federal Court for a discharge of the relator on *habeas corpus* was the sole remedy. The privilege does not concern the dignity of the court merely, but it is primarily and above all conferred for the just protection of the party himself, in order that the performance of a duty, or the submission to process which the party cannot resist, shall not be made use of to his injury or oppression. If any court were disposed to suffer its own process to be employed for such a purpose, any other court with competent authority should interfere to correct the wrong. (United States v. Edme, 9 Serg. & R. 147; Magnay v. Burt, 5 Q. B. 381: Henegar v. Spangler, 29 Ga. 217.) Otherwise a local court, taking advantage of the enforced presence of officers, parties or witnesses in attendance upon the general courts within its territorial jurisdiction, might permit parties to subject others to its authority in plain disregard of the statutory limitations upon it. It is for the protection of the party that we interfere in this case, that he may not be unwarrantably forced to a trial in a local court to whose process he was not properly subject."

29. *Civil Jurisdiction Cannot be Acquired by Use of Criminal Process.* The criminal process of a State cannot be used to take a person from one county to another, and thereby subject him to civil process in the latter county.

Byler v. Jones, 79 Mo. 261.
Palmer v. Rowan, 21 Neb. 452.
Wanser v. Bright, 52 Ill. 35.

And the principle should apply to cases where the process of extradition, either as between the States or as between one sovereignty and another, is resorted to for the purpose of obtaining service of civil process.

In re Reinitz, 39 Fed. Rep. 204.
Compton v. Wilder, 40 Ohio St. 130.
The State v. Simmons, 39 Kan. 262.
See Whart. Conf. Laws, § 2965.
Spear on Extradition (2d Ed.), 131, 145, 557.

But a civil suit may be prosecuted against a person brought on a criminal process from a foreign jurisdiction, by a creditor who had nothing to do, either directly or indirectly, with bringing the debtor within the jurisdiction of the court in which the suit is brought.

Williams v. Bacon, 10 Wend. 636.
Nichols v. Goodheart, 5 Ill. App. Ct. 574.
Slade v. Joseph, 5 Daly, 187.
Adriance v. Lagrave, 59 N. Y. 110.

30. *Appearance.* The technical meaning of the word *appearance* is an act done or word spoken in court by the

party against whom process has been issued, or by his attorney.

Crary v. Barber, 1 Col. 172.
Newlove v. Woodward, 9 Neb. 502.
People v. Wilgus, 5 Denio, 58.
1 Bouv. Law Dict., 127, 128.
1 Burrill Law Dict., 110.

To be effectual, the act of the defendant or his attorney must be made upon knowledge that a suit has been commenced against the former, accompanied with the intent to appear.

Merkee v. Rochester, 13 Hun. 157.

"Appearance" originated in the times when parties to a suit were expected actually to confront each other, personally or by attorney, before the court, previous to pleading or proceeding with the cause. This was so necessary, anciently, that stringent steps were requisite to compel a defendant to appear, if he would not voluntarily do so, before the plaintiff could proceed. The corporal appearance of a defendant is still required in a criminal trial. In the modern practice of civil actions the *appearance* may be made by the defendant in person or by an attorney. The present practice consists of making an entry in the record* setting forth the defendant's

*An appearance is a proceeding in court, and must constitute a part of the record of the cause in which it is entered. (McCormack v. First Nat. Bk., etc., 53 Ind. 466; Crary v. Barber, 1 Col. 172.) There is no appearance unless of record, for whether the defendant appeared or not ought to be tried by the record. (6 Comyn's Dig., 8; Tidd's Pr., 213.)

appearance in person, or by an attorney, and giving notice thereof to the plaintiff's attorney.

An appearance may be voluntary, compulsory, or gratis. A voluntary appearance is an appearance made in obedience to the process of the court; an appearance is compulsory when the defendant is brought into court by compulsory proceedings; a defendant is said to appear gratis when he puts in an appearance before service of process is made upon him. Any defendant against whom process has issued at common law or in equity has the right to appear without service of process.*

Ralston v. Chapin, 49 Mich. 274.

The right of joint defendants in equity and at law is well recognized.

Waffle v. Vanderhayden, 8 Paige, 45.
Higgins v. Freeman, 2 Duer, 650.
Wellington v. Claason, 9 Abb. 175.

---

* "There is no doubt of the right of any defendant at common law or in equity against whom process has issued, to appear without service. Whether it could be done generally before any process issued does not seem very clearly settled, as the rules of court adopted by the King's Bench and Exchequer have limited the power, and very little appears on the subject. But in any case where such an appearance was put in to save a right or protect an interest, it seems to have made no difference whether process was out or not." (See 1 Salk. 64; Com. Dig. "Pleader, B, 1"; 1 Tidd's Pr. 238.) And an appearance before the writ was returned, or when it has expired without service, has been held good. (Richardson v. Daley, 7 Dowl. Pr. 25; Moore v. Watts, 1 Ld. Raym. 916; Fanshaw v. Morrison, 2 Ld. Raym. 1138; Wynne v. Wynne, 1 Wilson, 39; 1 Tidd's Pr. 238; 1 Wait's Pr. 500, 559.)

And defendants, whether joint or not, may always protect their rights by appearing without service.

Hoffman's Ch. Pr. 170.
Fell v. Christ's College, 2 Brown's Ch. 279.
Bowbee v. Grills, 1 Dick. 38.
Jennison's Ch. Pr. 41.
1 Dan. Ch. Pr. 539, 540.
1 Barb. Ch. Pr. 81.

31. *Appearance may be General or Special.* An appearance of a party to an action, which recognizes the general jurisdiction of the court, or which is not made for the special purpose of contesting the jurisdiction of the court, or for any other special purpose, will be construed to be a general appearance in the case, and will be held to give the court general jurisdiction in the case over such party. An entry of appearance upon the record which does not show that the appearance is qualified, will be assumed to be a general appearance.

Carver v. Shelley, 17 Kan. 472.
Tower v. Lamb, 6 Mich. 361.
Shaw v. Moser, 3 Mich. 71.
McCombs v. Johnson, 47 Mich. 592.
Cron v. Krones, 17 Wis. 401.
Burdette v. Corgan, 26 Kan. 102.
The Kansas Life Association v. Lemke, 40 Kan. 142.

Form of General Appearance.

STATE OF MICHIGAN,
The Circuit Court for the County of .....

A.B. v. C.D.

In this cause the appearance of C. D., defendant, and of G. H....., attorney for said defendant, is hereby entered in said cause according to the rules and practice of said court.

Dated ....., 188. G. H.....,
Atty. for Defendant.

32. *Special Appearance.* By a special appearance e defendant submits to the court some specific question ɔt involved in the merits of the case. The right of the urt to exercise jurisdiction over the defendant is such question.

Atchison, Topeka & S. F. R. R. Co. v. Nichols, 8 Colo. 188.
Higgins v. Beveridge, 35 Me. 285.
Avery v. Slack, 17 Wend. 85.
Beckwith v. Kan. Cen. & O. R. R. Co., 28 Kan. 484.
Southern Pa. R. R. Co. v. Supervisors, 59 Cal. 471.
Fanning v. Trowbridge, 5 Hill. 428.
Elliott v. Lawhead, 43 Ohio St. 171.
Harkness v. Hyde, 98 U. S. 476.
Sullivan v. Frazee, 4 Robt. (N. Y.) 616.
Branner v. Chapman, 11 Kan. 118.
Upper Miss. Transp. Co. v. Whittaker, 16 Wis. 233.
Allen v. Lee, 6 Wis. 478.
Ames v. Winsor, 19 Pick. 247.
Nye v. Liscombe, 21 Pick. 263.
Brown v. Thompson, 29 Mich. 72.
Schwab v. Mabley, 47 Mich. 512.
Woodruff v. Young, 43 Mich. 548.
McLean v. Isbell, 44 Mich. 129.
Lane v. Leech, 44 Mich. 163.
McCaslin v. Camp, 26 Mich. 390.
Burdette v. Corgan, 26 Kan. 102.
Rubber Co. v. Goodyear, 9 Wall. 807.

As the allegations of a pleading are construed most rongly against the party who pleads them, it is obvious at a special appearance should set forth with precision s limits, and thereby secure certainty in the issue.

Burdette v. Corgan, 26 Kan. 102.
The Kaw Life Association v. Lemke, 40 Kan. 142.

Technical exactness, however, is not necessary. An

appearance will be considered as special which clearly indicates an intention not to make a general appearance.

Michels v. Stork, 44 Mich. 2.*

Form of Special Appearance.

STATE OF MICHIGAN, }
In the Circuit Court for the County of ..... }

D. H. S., G. T., J. H. P., H. T. F., Defendants,
ads.
G. A. M., Plaintiff.

And now comes the said defendant, D. H. S., by ....., his attorney, for the special and only purpose of this motion, and moves the said court, now here, that the service of the summons heretofore issued by the court in this cause against the said D. H. S. be quashed and held for naught, for the following reasons:

1. There was no record of service upon any of the defendants within the county from which said summons was issued prior to a service upon said D. H. S., who is a resident without the county.

2. Said D. H. S. is a resident of G..... county, and was served with a summons in the above entitled cause before any record of service was made upon any of the defendants within the county of ....., as required by statute.

This motion is based upon the records and files of the court in this cause.

Dated ....., 188 . C. B..... ,
Atty. for said Defendant D. H. S.

---

* "On the return day the defendant appeared and moved to dismiss the writ because no proper service was shown by the return. ..... It has been assumed that the defendant must declare that he appears specially for the purpose of making his motion or objection, and for no other purpose, or that jurisdiction will be conferred because of his general appearance. No doubt a general appearance would confer jurisdiction, but the appearance and objection then made should be considered together; and so considered, the objection or motion made limits and explains

33. *Defendant may Confer Jurisdiction by Waiving a Right.* A proceeding in an action at law may be regular, irregular, or a nullity. A proceeding is regular when it conforms to the rules and practice of the court in which the proceeding is had. A proceeding is irregular when it does not conform to the established rules and practice of the court, and the departure from the established rules and practice of the court does not extend beyond the line which separates an irregular proceeding from a nullity. The distinction between an irregular proceeding and a nullity is that the former is *voidable*; the latter is *void*.* As an irregular proceeding is voidable in its character, a person may, at his option, avail himself of any advantage he is entitled to under it, or he

---

the appearance, and clearly indicates an intention not to confer a jurisdiction where one is wanting." (Michels v. Stork, 44 Mich. 2.)

* Jenness v. Circuit Judge, etc., 42 Mich. 462. In this case the question presented to the court was whether certain proceedings were irregular or a nullity—that is, whether they were voidable or void. The court said: "The authorities elsewhere do not afford any clear or very satisfactory light. For the most part, the decisions seem to have been governed, or at least much influenced, by local practice or regulations, rather than by any general or leading principle. We must consider the point as a domestic question and depending on the facts and our own practice.

"It has been laid down that an irregularity is either the omitting to do something necessary for the due and orderly conducting of a legal proceeding, or doing it in an unseasonable time, or improper manner. (Tidd's Prac., 512.) Another author observes that in its most general sense an irregularity is the technical term for every defect in practical proceedings or the mode of conducting

may waive that; and the latter he may do by express stipulation or by implication as a consequence of his course of action. When the court has jurisdiction of the subject matter in controversy, and the defendant is entitled to object to the right of the court to entertain the action against him because of illegal service of process, and he makes a general appearance, he will, as a consequence of such appearance, be held to have waived his right to object to the jurisdiction of the court; he will be subject to the control of the court in all things, and to the same extent as though the service of process which was made upon him had been in every respect legal.

Sage v. R. R. Co., 96 U. S. 712.
Jones v. Andrews, 10 Wall. 327.
Grimmett v. Askhew, 48 Ark. 151.
McCormick v. Pennsylvania R. R. Co., 49 N. Y. 303.
Burson v. Huntington, 21 Mich. 415.
Pearson v. Kansas Manf. Co., 14 Neb. 211.

---

ing an action or defense as distinguished from faults in pleadings, and that a nullity is the highest degree of an irregularity, in the most extensive sense of that term, and is such a defect as renders the proceeding in which it occurs totally null and void, and of no avail or effect whatever, and incapable of being made so; and that it may perhaps be defined as a proceeding that is taken without any foundation for it, or that is essentially defective, or that is expressly declared to be a nullity by statute. And he proceeds to add that it may be laid down as a certain rule that whenever there is any doubt upon the matter, it will always be safe to treat the defect as an irregularity rather than as a nullity, and that there is a tendency in the judges to consider defects merely as irregularities. He also says that an irregularity may be waived, whilst a nullity never can be. (McNamara on Nullities, 2, 3, 6.)

34. *Appearance by Attorney.* The authority of an attorney at law, regularly admitted and licensed, to appear for the party whom he proposes to represent, is presumed until the contrary is shown; in other words, an appearance in a suit by an attorney of the proper court is presumed to be authorized.

Tally v. Reynolds, 1 Ark. 99.
Jackson v. Stewart, 6 Johns. 33.
Hamilton v. Wright, 37 N. Y. 502.
Leslie v. Fischer, 62 Ill. 118.
McAleer v. Young, 40 Md. 439.
Hagar v. Abrahams & Cochran, 66 Md. 253.
Price v. Ward and others, 1 Dutch. 225.
Dey v. Hathaway Printing Co., 41 N. J. Eq. 419.

But notwithstanding this presumption, the opposite party may compel the attorney at the commencement of suit to show his authority or to produce his warrant of attorney.

In Holmes v. Russel, 9 Dowl. 487, Mr. Justice Coleridge said: "It is difficult sometimes to distinguish between an irregularity and a nullity; but I think the safest rule to determine what is an irregularity and what is a nullity, is to see whether a party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

"There can be no doubt, I think, that the defect in question was an irregularity within the definition of Tidd; and the other authorities, I conceive, show it to have been nothing more. Had the execution defendant filed a stipulation by which he expressly assumed to waive the omission complained of, we cannot admit that any ground of error would have remained. And if it was competent to waive the defect by any method, the proceeding was not a nullity."

State v. Houston, 3 Har. (Del.) 15.
Lynch v. Com., 16 Serg. & R. 358.
Campbell v. Galbreath, 5 Watts, 423.
Standefer v. Dawlin, Hemp. 423.
Silkman v. Boiger, 4 E. D. Smith, 236.
O'Flynn v. Eagle, 7 Mich. 306.
Gillespie's Case, 3 Yerg. 325.
McAlexander v. Wright, 3 Mon. 189.
Clark v. Willett, 35 Cal. 534.
Knowlton v. Plantation, 14 Me. 20.*

And the court may, before judgment, and in a proper case, and on a proper showing, require an attorney to exhibit his authority for commencing an action.

Ninety-nine Plaintiffs v. Vanderbilt, 4 Duer, 632.
West v. Houston, 3 Har. (Del.) 15.
State v. Tilghman, 6 Iowa, 496.
McAlexander v. Wright, 3 Mon. 189.
Gillespie's Case, 3 Yerg. 325.
Clark v. Holliday, 9 Miss. 711.

In practice, an appearance by attorney, whether for plaintiff or defendant, if there is no collusion, is recognized by the adverse party as authentic and valid. Receiving their authority from the court, attorneys are deemed officers of the court. Their commissions declare them entitled to confidence, and are an assurance of both

* In some States it is *prima facie* sufficient if an attorney declares that he was duly employed by the plaintiff, or that he is the party's general legal representative. (Bogardus v. Livingston, 2 Hilt. (N. Y.) 236; Manchester Bank v. Fellows, 28 N. H. 302; Farrington v. Wright, 1 Minn. 241; Field v. Proprietors, 1 Cush. 11; Bridgton v. Bennett, 23 Me. 420; Henck v. Todhunter, 7 Har. & J. 275.)

their competency to manage and their fidelity in the care of the interests of their clients.

35. *Appearance of Infants.* An infant defendant cannot appear in person or by attorney, "for an attorney's appearing for him is without warrant"; he must appear by guardian.

Bingham on Infancy, 123, and note.
Coke, Litt., 135 *b*, and note 220.
2 Saund., 117, f. note (1).
Bac. Abr., Infancy, K. 2.
Oliver v. Woodroffe, 4 M. & W. 650.
Cruikshank v. Gardner, 2 Hill. 333.
Shepherd v. Hibbard, 19 Wend. 96.
Alderman v. Tirrell, 8 Johns. 418.
Comstock v. Carr, 6 Wend. 526.
Mockey v. Grey, 2 Johns. 192.
Peake v. Shasted, 29 Ill. 137.
Kesler v. Penninger, 59 Ill. 134.
Randalls v. Wilson, 24 Mo. 76.
Glass v. Doe, 2 Blackf. 293.
Miles v. Boyden, 3 Pick. 213.
Cavender v. Heirs, etc., 5 Iowa, 157.
Timmons v. Timmons, 6 Ind. 8.
Abdil v. Abdil, 26 Ind. 287.
Cook's Heirs v. Totten's Heirs, 6 Dana, 108.
Jarman v. Lucas, 15 C. B. N. S. 474.
Marshall v. Wing, 50 Me. 62.
Starbird v. Moore, 21 Vt. 529.
Wrisley v. Kenyon, 28 Vt. 5.
Swain v. Fidelity Ins. Co., 54 Pa. St. 455.

After the appointment of a guardian for an infant defendant, if an attorney appears for them, it will be presumed that he is properly authorized so to do.

Doe v. Brown, 8 Blackf. 443.

Neither, and for the same reason, can an infant plaintiff sue by attorney; he must sue by guardian or next friend.

Miles v. Boyden, 3 Pick. 213.
Keeran v. Clowser, 5 Blackf. 604.
Hooks v. Smith, 18 Ala. 381.
McDaniel v. Nicholson, 2 Cost. Rep. 344.
Jack v. Davis, 29 Ga. 219.
Jeffrie v. Robideaux, 3 Mo. 33.
Hurt v. Southern R. R. Co., 40 Miss. 391.

36. *Appearance for and by Corporations and by the Government.* The same rules apply to both municipal and private corporations as apply to natural persons in relation to the authority of those who represent them in courts; and these representatives have the same authority to bind their principals by their acts as have the representatives of natural persons.

Congar v. The Galena, etc., R. R. Co., 17 Wis. 477.
Shroudenbeck v. Phœnix Fire Ins. Co., 15 Wis. 632.

The United States, by voluntarily appearing in a State court as claimant of a fund therein, submits itself to the jurisdiction thereof.

Johnson v. Stimmel, 89 N. Y. 117.

And so does a State by appearing in a Federal court.

Clark v. Barnard, 108 U. S. 436.
New Jersey v. New York, 6 Pet. 323.

The word parties includes those who are sued in a representative capacity, as well as others.

North Lawrence v. Hoysradt, 6 Kan. 170.

37. *Plea to the Jurisdiction must be made a First Defense.* By the common law a party who would avail himself of the defense of want of jurisdiction of the court over the person of the defendant, must make that defense before pleading to the merits; a plea to the merits waives the right to call in question the jurisdiction of the court over the person of the defendant.

Grand Rapids, etc., v. Gray, 38 Mich. 461.
Gott v. Brigham, 41 Mich. 227.
Meixell v. Kirkpatrick, 29 Kan. 679.
Wilson v. Roots, 119 Ill. 395.
Harris v. Somerset, etc., 47 Me. 298.
Woodruff v. Bacon, 34 Conn. 181.
Cook v. Morse, 40 Conn. 544.
Reed v. Cates, 11 Col. 527.
Watson v. Baker, 67 Tex. 48.

The laws of some of the States have changed this rule of the common law, by requiring a plea to the jurisdiction to be included in or made by answer.

Sweet v. Tuttle, 4 Kern., 465.
Gardner v. Clark, 21 N. Y. 399.
Freeman v. Carpenter, 17 Wis. 126.
Dutcher v. Dutcher, 39 Wis. 651.
Thompson v. Greenwood, 28 Ind. 327.

When a plea to the jurisdiction is united in an answer with a defense to the merits, the court should determine the question of jurisdiction before permitting a trial on the merits.

Byler v. Jones, 79 Mo. 261.

38. *Withdrawal of Plea to the Merits does not divest Court of Jurisdiction.* Pleading to the jurisdic-

tion and withdrawing the appearance entered for that purpose by leave of the court, is not a submission of the defendant's person to the jurisdiction.

Graham v. Spencer, 14 Fed. Rep. 603.
Jones v. Andrews, 10 Wall. 327.
Harkness v. Hyde, 98 U. S. 476.

And after a plea to the merits has been filed, and it has been withdrawn by leave of court, the withdrawal of the plea does not withdraw his appearance; the defendant is still subject to the jurisdiction of the court, and will be bound by a personal judgment.

Eldred v. Bank, 17 Wall. 545.
Rowley v. Berrian, 12 Ill. 198.
Lawrence v. Yeatman, 2 Scam. 15.

By the withdrawal of both plea and appearance, no service of process having been made on the defendant, the jurisdiction of the court ceases.

Forbes v. Hyde, 31 Cal. 342.

A withdrawal, without prejudice to the plaintiff, of a general appearance entered by an attorney, for the defendant, means that the position of the plaintiff is not to be unfavorably affected by the act of withdrawal; that all his rights are to remain as they then stood.

Creighton v. Kerr, 20 Wall. 8.

ANALYTICAL INDEX.

NOTE.—References are to pages.